United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7318

To be argued by
VICTOR S. CICHANOWICZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOMINICK PAMPILLONIA,
Plaintiff,

against

CONCORD LINE, A/S,
Defendant and Third-Party Plaintiff-Appellee,

against

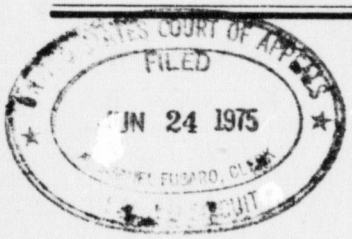
COURT CARPENTRY AND MARINE CONTRACTING CO.,
Third-Party Defendant-Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT



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6. Can liability for breach of the warranty of workmanlike performance be found when the party to be charged neither created the condition nor had any notice or knowledge thereof?

Statement of the Case

The plaintiff, a marine carpenter, sustained personal injuries aboard the vessel SS JILL CORD when he slipped and fell on grease. Concord Line owned and operated the vessel C.C. Lumber Co., Inc. was the employer of the injured carpenter and plaintiff and his co-employees were aboard the vessel for the purpose of chocking, boxing and making safe certain cargo which had been loaded and stowed by International Terminal Operating Co., Inc., a stevedore.

Plaintiff sued Concord Line on the basis of diversity of citizenship and maritime tort, alleging that Concord Line was negligent and the SS JILL CORD unseaworthy. Concord Line A/S impleaded both C.C. Lumber Co., Inc. and International Terminal Operating Co., Inc. as third parties, claiming indemnity because either, or both, breached their warranty of workmanlike performance. The third party claim against International Terminal Operating Co., Inc. was discontinued and is not germane to this appeal.

During the trial before Honorable Jacob Mishler and a jury, the negligence claim was dismissed. The unseaworthiness count was submitted to the jury, who found for the plaintiff and against Concord Line. Jury trial on the claim over was waived and the indemnity action was tried to the Court alone. The only additional testimony on the claim over was that of Captain William Wheeler, an expert witness who was not on board and had no personal knowledge.

By Memorandum Decision, Judge Mishler found for Concord Line and against C.C. Lumber for breach of warranty of workmanlike performance. Judgment was entered in favor of plaintiff against Concord Line and in favor of Concord Line against C.C. Lumber Co., Inc. in the same amount.

The judgment in plaintiff's favor has been satisfied and there has been no appeal therefrom. This appeal concerns only the judgment awarding indemnity to Concord Line against C.C. Lumber Co., Inc.

Statement of the Facts

This case arises out of injuries which were sustained by a marine carpenter as the result of an accident that occurred on April 3,1969 aboard the SS JILL CORD after cargo had been loaded aboard said vessel at Pier 2, Brooklyn, New York (7-15, 96-97).* Concord Line A/S was the owner

* Numbers in parentheses refer to pages in the Appendix.

and operator of that vessel. C.C. Lumber Co., Inc. (C.C. Lumber), sued herein as Court Carpentry & Marine Contracting Co., was the employer of the injured carpenter who together with other carpenters in the employ of C.C. Lumber (20-21, 55) were aboard the SS JILL CORD for the purpose of chocking, boxing and making safe certain cargo (9, 17-18, 25, 62, 64) which was loaded and stowed aboard the SS JILL CORD by International Terminal Operating Co., Inc., a contract stevedore (96-97).

The plaintiff's accident occurred when he allegedly slipped on the main deck in the vicinity of hatches Nos. 4 and 5, as he was on his way to pick up an electric saw which a saw man had been using to cut lumber on the offshore side of No. 5 hatch (9-15). Both the plaintiff and a fellow worker positively identified the substance which caused the plaintiff to slip as grease (14, 33-39, 41, 43, 46, 53, 59, 72, 74-75, 77). The vessel's Chief Officer who made an inspection of the deck upon learning of the accident also noted a spot of grease (109-110, 119, 121, 126).

There was no evidence of how or when the grease got on the deck. While employees of C.C. Lumber had done work in the vicinity of No. 4 and No. 5 hatch, all the eyewitnesses who testified on the trial were in agreement that no lashing work had been done by employees of C.C. Lumber in the vicinity of the area where the accident occurred. Both the plaintiff and his fellow employee were specific that lashing work had not been done (17-18, 27, 64-65). Chief Officer Nielsen testified that although he could not recall whether any lashing wires were in place when he went to the scene of the accident, he was sure that if they had been on, he would have recalled it (132-133). Furthermore, not one of the eyewitnesses ever testified that C.C. Lumber employees possessed or used any grease in their operations.

After all the parties had rested at the conclusion of the plaintiff's action against the shipowner, the Court dismissed

the plaintiff's cause of action for negligence (89). In so doing it stated:

> "The Court: No one testified that this condition was there one moment before. There's no proof as to how long it was there. The claim for personal injury as based on negligence is dismissed" (89).

The case was thereupon submitted to the jury only on the issue whether the shipowner had breached its warranty of seaworthiness (152). The shipowner's claim for indemnity against C.C. Lumber was reserved for trial by the Court (143-145).

In its charge to the jury the Court defined the plaintiff's claim for damages as one predicated on the contention that "he slipped and fell on some grease" (150).

In defining reasonable fitness as the standard under the warranty of seaworthiness, the Court stated:

> "The presence of grease alone on the deck does not in and of itself constitute a breach of the warranty. The question is whether the grease created a condition so that that portion of the deck was no longer reasonably fit as a passageway." (164)

In instructing the jury on contributory negligence, the Court stated:

> "Would a reasonable longshoreman under those circumstances have looked and seen the grease on deck? I am assuming you find it was there about where the plaintiff says it was and that that was the basis of the breach of warranty and that proximately caused the injury." (178)

After the jury had returned its verdict finding plaintiff free of contributory negligence and awarding him $80,000 in damages against the shipowner (209-211), the trial court, over the objection of C.C. Lumber, took additional

expert testimony (203-208, 213-217). According to the trial court's findings and conclusions, this expert's testimony established, through custom and practice, the possession of grease by C.C. Lumber through their employees prior to plaintiff's accident, and that they; (1) placed or dropped grease in an area normally used for passage by longshoremen; (2) allowed the grease or other slippery substance (a mixture of oil, sawdust and sap from the sawing operation) to remain in this area; and (3) failed to eliminate slippery conditions as required by § 1504.91(c) of the Safety & Health Regulations for Longshoring.

As will be demonstrated below, this expert's testimony did not establish a custom and practice of using grease in lashing operations, let alone a breach of the warranty of workmanlike service in any of the respects found by the trial court.

POINT I

The expert testimony failed to establish a trade custom or practice.

In *McClellan* v. *Pennsylvania R. Co.*, 62 F.2d 61, 63 (2 Cir. 1932) this Court stated:

> "Like all other questions of fact, a custom must be proved by evidence which if believed is enough to put it beyond mere conjecture and into the realm of reality."

In order to put a custom beyond mere conjecture and into the realm of reality it is necessary that there be "substantial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite, and uniform circumstances." *McClellan* v. *Pennsylvania R. Co., supra* at page 63.

Captain Wheeler not only did not testify that the use of grease in lashing operations was a definite, uniform, and

known practice, but at no time did he even say that the use of grease was a trade custom and practice. All he stated was that the practices regarding the lashing of deck cargo on ocean going vessels were the same just about throughout the world (222). His testimony however is completely silent as to what these practices were. It seems elementary that no custom is proved if the evidence fails to establish what that custom is.

It was Captain Wheeler's testimony that "The application of grease is necessary on the threaded elements of the lashing components." He did not say that the use of grease was based on any custom and practice but instead on his experience both as a stevedore superintendent and as a ship's officer (223). An expert's opinion based on personal experience establishes neither custom and practice nor is evidence of it. It is the imperative, certain, uniform, and universal character of a trade usage which establishes custom and practice and not an expert's opinion that something is necessary. In *United States Shipping Board E. F. Corp.* v. *Levensaler,* 290 F. 297 (D.C. Cir. 1923) cert. den. 266 U.S. 630 (1924), in reversing the trial court because the evidence was insufficient to establish trade custom and usage, the Court said at pages 301-302:

> "Nothing was said about it being certain and uniform, or that 'it must be the rule of all' the shippers. It could not be uniform among the shippers, if the practice was followed by only a 'large proportion' of them. It is not enough if it be confined to a part only of such persons. It must be the usage of all. Adams case, supra. Of course, it is not necessary that every one engaged in the business to which it applies should always follow it (Hewlett v. Burrell, 105 Fed. 80, 44 C. C. A. 362), but it must be recognized by all as a custom of the business (Minis v. Nelson, supra). Indeed, the trial court told the jury that they could find the custom existed even though they also found that there were other methods of financing shipments of

> grain in use during the period in question. This is in direct violation of the rule of uniformity, for, in the language of Judge Sanborn, 'if it [the custom] vary, it furnishes no rule by which to mete.' We think the court erred in the respects mentioned, and that the facts found did not establish a valid usage of the shippers of grain."

As in that case there was testimony in this case that there were other substances which could be used to lubricate the threaded elements of the lashing components. Captain Wheeler conceded that oil could also be used (232). While he stated that grease had greater adhesive qualities and therefore wouldn't evaporate or wash off as readily as oil (224), at no time did he say that the custom of the trade did not permit the use of oil. In *Federal Reserve Bank* v. *Malloy*, 264 U.S. 160, 170 (1924), the Court stated:

> "A custom to do a thing in either one or the other of two modes, as the person relying upon it may choose, can furnish no basis for an implication that the person sought to be bounded by it had in mind one mode rather than the other."

POINT II

The expert testimony was insufficient as a matter of law to establish a custom of C. C. Lumber Co., Inc.

In *Cereste* v. *New York, New Haven & Hartford R. Co.*, 231 F.2d 50, 53-54 (2 Cir. 1956), 351 U.S. 951 (1956), this Court held that while evidence of a person's custom and practice or habit may be relevant in establishing the doing on a specific occasion of an act which is the subject of the habit or custom, it cannot be accorded any weight and must be excluded if the habit is not sufficiently regular and uniform or the circumstances sufficiently similar.

At no time did Captain Wheeler testify that it was the custom and practice of C.C. Lumber to use grease in lashing operations. As a matter of fact Captain Wheeler never stated that he had ever seen employees of C.C. Lumber use grease in lashing operations.

Captain Wheeler was explicit that even though C.C. Lumber had been in business since "at least into the thirties, early forties" (231), its employees never worked for him directly and he had no recollection of "them ever being aboard a ship that I was on, that I was in" or that he was Captain of (231-232). All that he testified to was that on occasion he had been on ships on which employees of C.C. Lumber were doing work involving deck cargo (230-231). While he estimated the number of these occasions as in the area of 100, he stated that he did not take particular note to count on how many occasions they were doing lashing (231). It was also his testimony that he did not take particular note whether employees of C.C. Lumber ever had grease pots with them or not (231).

Thus not only was there no testimony as to any custom of C.C. Lumber to use grease in lashing operations, but even if an inference could be drawn from his testimony that C.C. Lumber used grease in lashing deck cargo, there is a complete absence of any evidence of either regularity and uniformity or similarity of circumstances to sustain a finding of custom. As this Court held in *Strauss* v. *Douglas Aircraft Co.*, 404 F.2d 1152, 1158 (2 Cir. 1968), evidence of a party's prior conduct in order to show a party's custom or habit has no probative value and is not admissible unless the occurrences are numerous enough to base an inference of systematic conduct. In the *Strauss* case a single instance was held to be insufficient. In this case there was no evidence of even one prior instance.

POINT III

The expert testimony did not provide a basis for the Court's finding that C.C. Lumber Co., Inc. breached its warranty to perform in a workmanlike manner.

Assuming *arguendo* that Captain Wheeler's testimony established a trade custom to use grease in lashing operations and that this was C.C. Lumber's custom, the evidence nonetheless precludes the Court's finding that in using grease C.C. Lumber breached its warranty to perform its services in a workmanlike manner by (1) placing or dropping grease in an area normally used for passage by longshoremen; (2) allowing the grease or other slippery substance to remain in that area; and (3) failing to eliminate a "slippery condition" as required by Sec. 1504.91(c) of the Safety and Health Regulations for Longshoring [263].

In ruling on the effect of custom and practice in establishing liability, this Court said in *Tropea* v. *Shell Oil Company*, 307 F.2d 757 (2 Cir. 1962), at page 763:

> "It is well established that a general practice in a particular trade is relevant in order to prove that one following the practice exercised due care or that one not following it failed to exercise due care."

It is axiomatic that evidence of general practice is relevant only to establish a standard against which to compare the conduct under investigation. It is not a substitute for proof of such conduct and establishes nothing.

In the only testimony as to custom and practice, Captain Wheeler testified in response to a question by the Court:

> "The Court: Is there a custom and practice as to how the grease is applied; liberally, is it applied on the outside as well as the inside?

The Witness: It's applied to the threaded rod, usually, the male portion and as you insert it into the female thread, it will lubricate that, too. It's applied —it's not applied too excessively. It should not be applied excessively, enough to serve the purpose. You can see it if you look at it." (224-225)

Although according to this custom and practice grease was applied only to the threaded rod of the lashing components and not placed or dropped on deck; and was applied only in a quantity sufficient to lubricate the female portion when the male portion was inserted into it and it could be seen if you looked at it (223-225), the Court below concluded that employees of C.C. Lumber did not act in accordance with the custom and practice but instead placed or dropped grease in the area normally used for passage by longshoremen and allowed grease or other slippery substance to remain in that area (263). Since custom and practice establishes only the doing of the act which is the subject of that custom or habit, no other inference is possible or permissible except that, if on the occasion in question C.C. Lumber did the act, it did it only in accordance with that custom or habit. *Cereste* v. *New York, New Haven & Hartford R. Co.*, 231 F.2d 50, 53-54 (2 Cir. 1956), cert. den. 351 U.S. 951 (1956).

Under the law, the mere happening of the accident does not shift to the third-party defendant the burden of establishing that the accident did not occur through its negligence or lack of due care does it create a presumption of negligence or lack of due care. On the contrary, the legal presumption is that reasonable care was exercised by the third-party defendant C.C. Lumber. *Armstrong* v. *Commerce Tankers Corp.*, 311 F. Supp. 1236, 1240, affirmed 423 F.2d 957 (2 Cir. 1970), cert. den. 400 U.S. 833 (1970).

In this connection, it might be noted that even though on trial the shipowner produced the Chief Mate of the SS JILL CORD, and he testified as a witness on its behalf, he was

neither asked nor did he testify that the lashing components were lubricated with grease on the occasion in question or that the grease came from the lashing gear, though he inspected the deck when the accident occurred and saw a grease spot (109-111, 119, 121, 126). As this Court indicated in *J.Gerber & Co.* v. *SS Sabine Howaldt,* 437 F.2d 580, 593 (2 Cir. 1971), the testimony of an expert witness cannot be accorded any favorable inference when a party elects to rely on his testimony to establish its case rather than on the testimony of a witness who is in a position to know the facts and is under its control.

POINT IV

Expert testimony does not prevail over established facts and cannot be a basis for opposing inferences.

The trial court's findings that C. C. Lumber was in possession of grease by its employees (*prior to the accident* (262) is not only unwarranted but is in direct conflict with established facts in this case. (Emphasis supplied.) The only eyewitnesses to the accident and the circumstances thereof who testified on the trial were the plaintiff; Rina, a fellow employee; and Nielsen, the Chief Officer of the SS JILL CORD. Both the plaintiff and Rina specifically testified that no lashing work was done at all in the vicinity of the area in question prior to the plaintiff's accident (17-18, 27, 64-65). Chief Mate Nielsen testified that he did not have a clear recollection whether the lashing wires were on or not at or about the time of the accident. He conceded, however, that if they had been on, he would have recalled it (132-133). Thus even if possession of grease by C.C. Lumber prior the accident could be established by the testimony of the expert Wheeler, it cannot prevail over established facts and furnishes no basis for opposing inferences. *United States* v. *Spaulding,* 293 U.S. 498, 506 (1935).

POINT V

The verdict on the indemnity claim must be consistent with the jury's findings on the main claim.

The trial court's finding that C.C. Lumber breached its warranty of workmanlike service because in the alternative it allowed "other slippery substance to remain in the area as a passageway by plaintiff and other longshoremen" (263) is inconsistent with the determination of the jury and contrary to established fact.

All of the eyewitnesses, i.e. the plaintiff, his co-employee Rina, and Chief Officer Nielsen testified that the substance which they saw on the deck of the SS JILL CORD on which plaintiff slipped was grease (14, 33-39, 41, 43, 46, 53, 59, 72, 74-75, 77, 109-110, 119, 121, 126). The vessel's log (Defendant's Exh. "O") also contains the entry, "The worker slipped in a lump of *grease.*" (Emphasis supplied). At no time was there ever any question that the substance which caused the plaintiff to slip was anything other than grease.

In its charge to the jury the Court defined plaintiff's claim as a claim that: "he slipped and fell on some *grease*" (150). (Emphasis supplied).

In defining by which standard the jury was to measure whether the vessel was seaworthy or not, it said:

> "The presence of *grease* alone on the deck does not in and of itself constitute a breach of the warranty. The question is whether the *grease* created a condition so that that portion of the deck was no longer reasonably fit as a passageway" (164). (Emphasis supplied).

In charging the jury on contributory negligence the Court said in part:

> "Would a reasonable longshoreman under those circumstances have looked and seen the *grease* on deck? (178) (Emphasis supplied).

In rendering its verdict for the plaintiff the jury is presumed to have followed the Court's instructions and found that the plaintiff slipped on grease and not on some other substance. *Joel* v. *Research Products,* 94 F.2d 588, 589 (2 Cir. 1938).

As this Court held in *Caputo* v. *U.S. Lines Company,* 311 F.2d 413, 416 (2 Cir. 1963), the Court must follow the verdict of the jury. The trial court's finding that C.C. Lumber created a dangerous and unsafe place to work by allowing another slippery substance to remain in the area used as a passageway, is therefore inconsistent with the verdict of the jury and cannot stand.

POINT VI

Liability for breach of the warranty of workmanlike performance cannot be found when the party to be charged neither created the condition nor has any notice or knowledge thereof.

In *Calderola* v. *Cunard Steamship Company,* 279 F. 2d 475 (2 Cir. 1960) cert. den. 364 U.S. 884 (1960), the Court held that knowledge of a slippery condition which is acquired at the time of the accident is not sufficient to support a finding of breach of warranty of workmanlike service. At page 478 it said:

> "This knowledge acquired by the plaintiff so short a time before he slipped was insufficient to put the stevedore on notice of the condition and give it an opportunity to remove the grease or to have the ship's crew do so before the accident. *Cf. Santomarco* v. *United States,* 2 Cir., 277 F. 2d 255. Furthermore, the evidence tended to show that the grease could have been present on the ladder for only a short time before the accident, and thus it would be unreasonable to require the stevedore to have discovered the grease in the course of normal routine."

According to the Trial Court, there was no evidence as to when the grease got on the deck or how long it had been there. In dismissing the plaintiff's cause of action based on negligence, it said:

> "No one testified that this condition was there one moment before. There's no proof as to how long it was there." (89)

It appears elementary that if there is no evidence establishing when the grease got on deck there can be no finding that C.C. Lumber either had notice of the condition or an opportunity to remedy the condition.

Nor is the Trial Court's finding that for more than two hours prior to the accident only C.C. Lumber employees were in the vicinity of the site of the accident, with the exception of the presence of one of the ship's officers for a brief *cursory* inspection (262), sufficient to establish either actual or constructive notice. (Emphasis supplied)

In *Ignatyuk* v. *Tramp Chartering Corp.*, 250 F 2d 198, 201 (2 Cir. 1957), this Court held:

> "[A]n implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection."

Since the chief mate could not discover the condition by a cursory inspection, the Trial Court was incorrect in holding that C.C. Lumber nonetheless breached its warranty of workmanlike service because it failed to clean up what the mate could not discover.

CONCLUSION

The judgment which has been entered herein against C.C. Lumber in favor of Concord Line, together with costs, disbursements and counsel fees, should be vacated and set aside and the third party complaint dismissed and judgment entered in favor of C.C. Lumber with costs and disbursements.

Respectfully submitted,

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Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 2nd day of JUNE 1975

Harold Gardner Poor & Havens
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